


Minister of Finance, Defence and Corporate Affairs

A former colleague from the legal fraternity has handed me a note which I am enclosing. It indicates that under various bilateral treaties, there are 23 arbitrations which are on, where Government of India is not being adequately represented. There are some which concern the Department of Revenue which I am bringing to the notice of Revenue Secretary for immediate action. There are others which are dealt by the Ministry of Mines and Ministry of Heavy Industries. These are illustrative cases only.

In some cases we are defaulting in the matter of appointment of arbitrators. This will result in the international forum usurping our power to appoint the arbitrator. We have engaged lawyers who may not have adequate stature to create an impact on these arbitrations. Further, there is no coordinating Ministry which is following it up on day to day basis. This needs to be addressed adequately.



[Arun Jaitley]

Minister of Finance, Defence and Corporate Affairs
26.5.2017

Principal Secretary to PM

**BRIEF NOTE ON SUGGESTIONS FOR EFFECTIVE HANDLING
OF BIT ARBITRATIONS**

On date, there are 23 Investment Treaty Claims made against the Republic of India, which are pending adjudication before various arbitral tribunals.

It is necessary that these cases are effectively handled so as to avoid adverse awards being passed against the Republic of India, which have huge financial implications. An adverse award could also entail payment of full or part of the costs of the arbitration.

A. Some of the cases where necessary steps need to be taken, to ensure effective representation of the country's interest, are:-

1. **Vodafone** has filed two parallel claims arising out of two BITs viz. India-Netherlands BIT and India-UK BIT.

(i) In the claim filed under the Netherlands BIT, the Government of India has appointed the Firm Curtis Mallett-Prevost Colt and Mosle LLP to handle the case. The said Law Firm is acting both as Solicitor and as Counsel on behalf of the Govt. of India. The case also involves questions of Indian law. However, there is no Indian lawyer or law firm appointed to represent the Govt. of India in this case. That since parties could not agree on the Chair of the tribunal, the Chairperson was appointed by the President, ICJ. The Chair of the tribunal (Sir Franklin Berman) and lead counsel for Vodafone (Toby Landau QC) are both from Essex Court Chambers. It would be advisable to

Reverse

have a leading QC to represent the Government from Essex Court Chambers. One of the leading QCs who is not conflicted, and is also representing the Govt. of India in other cases is Salim Moollan QC who could be considered for engagement.

Apart from Counsel from Essex Chambers, other QCs of repute and standing who could be considered, and are not conflicted, are Joe Smouha QC, Peter Goldsmith QC, Maurice Mendelson QC.

It is important that a QC of Repute is engaged, rather than on the basis of a low fee quote.

- (ii) In the case filed by Vodafone under the UK Treaty, the Government has not yet appointed its nominee Arbitrator, and the President of the ICJ as the appointing authority under the Treaty, in all likelihood would make the appointment.

If the Govt. of India does not appoint the Arbitrator of its choice in a timely manner, it would have to put up with an Arbitrator appointed by the appointing authority. This causes serious prejudice to the interest of India. The Govt. will then be faced with a tribunal forced upon it, without any choice of its representation.

Further, ~~a~~^{the} suggestion made by some bureaucrats of not participating in the arbitration would not be prudent, as any objections, including objections on jurisdiction of the tribunal, have to be made before the tribunal. In the event of India not contesting the case, it would result in an ex

Reverend

parte award being passed and enforcement proceedings being initiated in India and any other part of the world, where India has commercial assets.

2. **RAKIA case** : The claim pertains to Ministry of Mines and is filed under India-UAE BIT. The Govt. of India is yet to appoint the Arbitrator, despite a year having elapsed since the Notice was received in March 2016.

Mines

The Ministry of Mines has not engaged any Counsel so far to represent the Government in this case.

3. **Nissan case** : The claim is filed under the India-Japan FTA. The State Govt. of Tamil Nadu is not disputing the payment of the amount due to the Claimant. However, no efforts to settle the matter and phase out the payment has been made.

Heavy Industries

The Claimant has approached the Appointing Authority i.e. the Permanent Court of Arbitration (PCA) for appointing the nominee - arbitrator of the Govt. of India. If the matter culminates in arbitration, the tribunal can award Costs and Interest on the outstanding payment.

It would therefore be advisable to settle the matter before the arbitration commences.

4. **Cairn and Vedanta cases**: Two claims arising out of the India-UK BIT have been instituted before an arbitral tribunal, making a claim for compensation on account of the retrospective amendment of the Income Tax Act

whereby ITAT recently passed an Order in favour of the Government, and the Government has taken steps to enforce the ITAT Order. This has led to the tribunal not allowing bifurcation of the Cairn case, and to expedite the hearings and also positively rule on their request to have a hearing for interim measures. It would be prudent to engage Tax and Damages Expert in these cases, like the claimant have done.

Revenue

B. SUGGESTIONS

It is imperative that effective steps are taken to streamline the representation of the Govt. of India in the BIT arbitrations. Some suggestions are as follows:

Standard Operating Procedures must be put in place:

- An Inter-Ministerial Committee comprising of representatives from the Finance Ministry, the External Affairs Ministry, the Law Ministry, and the concerned Ministry is constituted, to effectively represent the State, and act as a Lead State Agency.

The Legal and Treaties Division of the Ministry of External Affairs may be given a lead role in the committee, as it has vast experience and expertise in dealing with international law disputes and matters before international tribunals.

- The Committee is empowered to receive notices and reply to the same; and issue notices and request for arbitration.

- The Committee must be empowered to engage Counsel having expertise, both from within the country, and external Counsel to represent the Govt. of India. The criteria for engagement of Counsel and appointment of an Arbitrator must be expertise in Investment Treaty Law, and standing of the Counsel on this subject, rather than on the basis of a low fee quote.
- The said Committee must be able to effectively co-ordinate with various departments in the Government, and at the State level, to provide timely instructions to Counsel conducting the arbitrations.
- The Committee must be able to issue instructions for payment of the fees and expenses of the arbitral tribunal, Counsel and Experts engaged.
- The Lead State Agency must closely monitor the progress of each of these arbitrations.

The procedure of the Lead State Agency being constituted may be communicated through regulation or directive. The Information can be posted online with a template of Notice of Intent.
